

IN THE MATTER OF
• THE RIGHTS OF THE CITY OF CHICAGO •
WITH RESPECT TO

STREETS AND SLIPS


NORTH OF RANDOLPH STREET AND
EAST OF MICHIGAN AVENUE


AN OPINION

GIVEN TO THE
COMMITTEE ON RAILWAY TERMINALS
OF THE

CITY COUNCIL OF CHICAGO

BY
WALTER L. FISHER





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CHICAGO, May 21, 1919.

Alderman William F. Lipps,
Chairman, Committee on Railway Terminals,
City Council of Chicago,
City Hall, Chicago.

DEAR SIR:

Careful consideration has been given to your request for an opinion with respect to the rights of the City of Chicago to extend its jurisdiction over Lake street, South Water street and River street easterly to or towards Lake Michigan, and the right of the city to prevent the Illinois Central Railroad Company from filling and occupying the five slips which extend into its yards or between its docks east of Michigan avenue and north of Randolph street. There are many questions of law involved as to which the decisions of the courts are not entirely clear, and there are many questions of fact as to which the evidence presented is not conclusive. For these reasons the opinions hereinafter expressed are necessarily qualified.

The Illinois Central Railroad Company maintains that the rights of the city in Lake street and South Water street terminate at the easterly line of Beaubien court about 180 feet east of Michigan avenue, and its rights in River street at a line 250 feet east of Michigan avenue, and the company proposes that in the ordinance now under consideration, relating to the lake front and harbor, the city shall waive any claim of right to extend the streets in an easterly direction beyond the respective termini above indicated. The company has been invited to submit any evidence in its possession tending to support the views thus advanced, and has submitted various records, maps and other documents, as well as certain legal opinions, all of which have been carefully examined.

Subject to the qualifications hereinafter noted, it is my opinion that the city does not have the right to any extension of Lake street east of Beaubien court; that it may have the right to an extension of River street east of the line 250 feet east of Michigan avenue; that it does have the right to extend or occupy South Water street from Beaubien court easterly to or towards Lake Michigan (the exact location and dimensions of such extension being dependent on evidence not now available to us); and that the Illinois Central Railroad Company does not have the right to fill and occupy the five slips in question without the consent of the city.

The Illinois Central Railroad Company claims that the city has no right to extend any of said streets nor to prevent the filling of said slips, but that the company has a good title to the land involved in the streets or street extensions, and to the above mentioned slips, by deed, by legislative authority, by decree of court, and by abandonment, adverse possession, or estoppel. After careful analysis of all these claims, no one of them appears to be conclusively established, although each of them presents questions of serious difficulty, and collectively they make, at least with respect to some of the rights claimed, a formidable case for the city to overcome.

The principal questions of law and fact are discussed in the following statement. My partner, Mr. William Warren Case, has co-operated in its preparation and concurs in this opinion.

DOCUMENTARY EVIDENCE.

Among the records and documents which have been examined the following are the most important:

1. The printed transcript of record for the Supreme Court of the United States in the Lake Front case, reciting numerous statutes, ordinances, deeds, maps and other muniments of title and documentary evidence.

2. A printed pamphlet containing the decrees rendered by the Circuit Court of the United States, the Circuit Court of Appeals, and the Supreme Court of the United States in the Lake Front case.

3. The various documents, enactments and other data set out in the official reports of the Lake Front case, especially in volume 33 of the Federal Reporter, page 730, and in volume 146 of the United States Supreme Court Reports, page 387; together with Mr. Justice Harlan's statement of facts in the report in volume 33 of the Federal Reporter.

4. An abstract of title made by Handy, Simmons & Co. (herein called the Handy abstract), dated June 16, 1874, and covering various property in the southwest fractional quarter of Section 10 east of Michigan avenue and north of Randolph street.

5. Copy of a report (herein referred to as the Inman report), dated January 11, 1917, made by George Inman to John D. Riley, superintendent of maps; accompanying which are various diagrams, blue prints and copies of documents in the city clerk's office.

6. A blue print of the plat of Fort Dearborn Addition to Chicago, purporting to be copied for the city map department from a reprint in the possession of the corporation counsel.

7. A blue print purporting to show the tracks, buildings, piers and other improvements east of Michigan avenue, between Madison street and the Chicago River.

8. Printed pamphlets purporting to be copies of lease of November 1, 1872, lease of May 21, 1894, and agreement dated May 21, 1894, for partition of station grounds, all between the Illinois Central and Michigan Central Railroad Companies.

9. Typewritten document purporting to be a copy of a deed from Illinois Central Railroad Company to Michigan Central Railroad Company, dated March 22, 1864.

10. Lieut. Col. J. D. Graham's annual report to the War Department, dated December 31, 1855 (herein referred to as the Graham report), printed in volume 5 of United States Senate Executive Documents for the third session of the Thirty-fourth Congress.

11. A blue print in the United States Engineer's office at Chicago of map attached to agreement of September 26, 1855, set out in the Graham report, with reference to line of excavation of the Chicago River, said map being referred to in said report as map G17.

12. Document purporting to be copy of agreement between the Illinois Central Railroad Company and the United States, dated May 21, 1858, with reference to opening in south pier in front of slip B; also communication from the company's engineer to its counsel transmitting said document, together with a blue print purporting to show the location of the old south pier and the openings therein.

13. Seven affidavits made by employees of the Illinois Central Railroad Company relating to the occupancy of the territory in question.

I.

TITLE TO STREETS.

While the questions relating to the streets involve much of the same evidence as the questions relating to the slips, separate treatment of the two subjects will conduce to clearness, even at the expense of some repetition, and the status of the streets will, therefore, be taken up first.

Preliminary.

From information thus far available it appears that in the year 1804 the United States established on the southwest fractional quarter of Section 10 the military post of Fort

Dearborn, bounded on the north and east by the Chicago River and Lake Michigan, and on the south and west by what are now the lines of Madison street and State street. When this reservation was no longer required for military purposes, the Government caused it to be surveyed and divided into blocks and lots, and the plat of Fort Dearborn Addition to Chicago was filed for record June 7, 1839. This map shows Lake street extending 97.3 feet, South Water street 132 feet, and River street about 232 feet easterly from Michigan avenue to the waters of Lake Michigan. The effect of this plat of Fort Dearborn Addition to Chicago was to vest in the City of Chicago, which was incorporated in 1837, the title to the soil of the streets delineated thereon.

United States v. Illinois Central R. R. Co., 154 U. S., 225.

Williams v. Chicago, 247 Ill., 240.

The Government, however, in opening Fort Dearborn Addition to sale in 1839, still reserved for a Marine Hospital site an area at the north end, which is colored green on the map shown at page 18 of the Handy abstract. This area extended south along the lake shore as far as the south line of Lot 5 in Block 5, a distance of 224 feet south of River street measured along the east line of Michigan avenue. Across this reserved area River street and Michigan avenue are projected on the plat, but the title to the portion of these streets falling within the Marine Hospital grounds, or at least the effective jurisdiction over the same, did not vest in the City of Chicago until the Government finally relinquished the hospital reservation and sold the property.

United States v. Chicago, 7 How., 185.

There is no doubt, however, that the title to River street as laid out on the plat did eventually vest in fee in the City of Chicago.

By deed dated October 14, 1852, copies of which are shown

on page 302 of the printed record in the Lake Front case, and on page 81 of the Graham Report, and which was rerecorded in the recorder's office October 21, 1876, in Book 647, at page 505, as Document Number 107832, the United States conveyed to the Illinois Central Railroad Company, for a consideration of \$45,000, a part of the Marine Hospital site, bounded on the west by a line 250 feet east of Michigan avenue, on the north by the piers in the Chicago River forming the harbor of the city, and on the east by the low-water mark of Lake Michigan, but subject to the right of excavation authorized by the Congressional act of July 21, 1852. At about the same time, or within a few years thereafter, the company acquired from various owners all the other shore lots as far south as Randolph street. See 33 Fed. Rep., page 744, and list of deeds in printed record of Lake Front case, beginning at page 303. The land east of the shore line thus acquired has been filled in and artificially reclaimed by the Illinois Central Railroad Company. It is to be borne in mind, however, that when the company acquired this shore property, the waterfront was far to the east of the line where it is shown by the plat of Fort Dearborn Addition to have been in or about the year 1839.

Effect of Accretions.

The accretions which had formed along the shore, whether due to the natural action of the elements or to the extension of the Government pier, belonged to the owners of the water lots.

Lovington v. St. Clair County, 64 Ill., 56.

Brundage v. Knox, 279 Ill., 450.

Subject, therefore, to any valid rights of the city in public streets, the Illinois Central Railroad Company obtained through its several purchases a good title to all the land between the Chicago River and Randolph street bounded by the water's edge as it then was, and good title to any subsequent

accretions formed before the company began to reclaim the submerged land artificially. The streets laid out on the plat as affording access to the water continued, nevertheless, to extend to the lake shore over the intervening accretions.

Newark Lime Co. v. Newark, 15 N. J. Eq., 64.

State v. Yates, 104 Me., 360; 71 Atl., 1018.

Frater v. Wharf Co., 57 Fla., 63; 49 So., 188.

Hathaway v. Milwaukee, 132 Wis., 249; 111 N. W., 570.

One claim put forward, however, is that the shore lots depicted on the plat of Fort Dearborn Addition fronted in fact upon an old channel of the Chicago River and not upon the lake, and the argument on that assumption is that title to the accretions would only extend to the middle of the river channel, somewhere in the neighborhood, it is supposed, of Beaubien court. From testimony of witnesses printed in the record of the Lake Front case, it appears that at the time of the original township survey in 1821, there was at the mouth of the river a sandbar, which in the dry season nearly, and sometimes entirely, closed the direct outlet into the lake. Under such conditions the current became imperceptible, and what little flow there was often found its way through a channel inside of the bar to an outlet near Madison street. In the early spring months a strong current would again score its way through the barrier into the lake. In 1822 the freshets closed the south channel altogether for the time being. Similar conditions were reported by the United States Engineer in 1830 (Printed Record, page 464); though an earlier topographical map accompanying the report and attached to the Lake Front case record (original page 1206) pictures the river as circling about Fort Dearborn inside of a beach of sand and gravel.

The south pier, constructed at the mouth of the river about 1834, must have closed this old channel altogether at the north

end, and certainly produced material changes in the shore line. Sand gradually accumulated south of the pier, and the Surveyor General, by request of certain persons who had built shanties on the new land, caused a survey of what was called a sandbar or island to be made by E. B. Talcott. (Handy Abstract, page 2.) This Talcott survey, dated February 13, 1836, covers everything east of the line of the original 1821 survey, and includes land on both sides of what is shown thereon as the old river channel. The area shown by Talcott in Section 10 is 26.17 acres, but the survey itself was officially rejected by the Government for the express reason that the tract surveyed was an accretion to and hence a part of the Fort Dearborn reservation. Prior to this decision, however, according to witnesses examined in the Lake Front case, a gale had blotted the island or sandbar out of existence, except perhaps a small spit adjacent to the mouth of the Chicago River. If the bar appeared again it was doubtless soon merged in permanent accretions to the shore. While there seems to have been water in parts of the old channel when the Illinois Central passenger station was erected about 1855, the existence of any permanent river channel between the outer bar and the upland remains a matter of speculation. Mr. Inman, of the city map department, believes that there are old charts in the Land Department at Washington which might throw additional light on the history of the accretions to the shore and of the old river channel. The witnesses who testified in the Lake Front case are dead, but the decision of the Government (Handy Abstract, page 69) that the flats included in the Talcott survey were in fact an accretion to Fort Dearborn reservation is entitled to some consideration as evidence that the shore lots platted upon Fort Dearborn Addition extended to Lake Michigan and not merely to the margin of a river; and any person claiming legal rights by reason of a river channel east of the Fort Dearborn Addition would have the burden of showing that the plat of that addi-

tion erred in its representation of the lots as fronting on Lake Michigan.

Artificial Reclamation.

Soon after the year 1852, however, as hereinafter more fully set forth in detail, the Illinois Central Railroad Company began to fill the bed of the lake opposite the street ends, and in the course of a few years had thus reclaimed an extensive area. The company claimed the right to appropriate the submerged lands, first, as a common-law incident of the ownership of the shore, and secondly, by virtue of the provisions of its charter. At this stage of the argument, it is sufficient to observe that neither claim was well grounded in law. The bed of Lake Michigan belonged to the State of Illinois, and could not lawfully be appropriated to private use by owners of the shore.

Revell v. People, 177 Ill., 468.

Cobb v. Lincoln Park Commissioners, 202 Ill., 427.

Shively v. Bowlby, 152 U. S., 1.

It is also true that the charter of the company, rightly interpreted, conferred upon it no right to reclaim the submerged land.

Illinois Central R. R. Co. v. Chicago, 173 Ill., 471.

Illinois Central R. R. Co. v. Chicago, 176 U. S., 646.

The Lake Front Act of 1869, hereinafter referred to, operated as a condonation of the trespasses committed up to that time upon the domain of the state, and also, until its repeal in 1873, as a license for further encroachments.

Illinois v. Illinois Central R. R. Co., 146 U. S., 387.

The precise terms and effect of the decrees in the Lake Front case will be more fully considered under a subsequent heading. The view of riparian rights in this state adopted by the United States Supreme Court is admitted to have been wrong, but the decree itself, upon all issues actually raised and

determined between the parties, became nevertheless the "law of the case," and is an adjudication binding upon the Illinois Central Railroad Company, the State of Illinois and the City of Chicago.

Illinois v. Illinois Central R. R. Co., 184 U. S., 77.

By that decree it was determined and adjudged:

"That the Illinois Central Railroad Company is the owner in fee of all the wharves, piers and other structures erected by it in the City of Chicago east of Michigan avenue, south of the Chicago River and north of the north line of Randolph street."

It may be taken, therefore, as settled between the parties to this litigation that the Illinois Central Railroad Company, whether by virtue of its riparian rights or under some other pretext, became the general legal owner of the artificially reclaimed land in front of Fort Dearborn Addition. The conclusion, however, by no means follows that the title thus acquired was or is in derogation of the public right to streets extending over the made land to the new water front.

"The rule of law is well settled that a public street leading to navigable waters will keep even pace with the extension of the land, whether the change in the land be due to natural causes or to the voluntary act of the owners of the land."

Frater v. Wharf Company, 57 Fla., 63; 49 So., 188.

Dana v. Craddock, 66 N. H., 593; 32 Atl., 757.

Allen v. Buffalo Ry. Co., 151 N. Y., 453; 45 N. E., 845.

Jersey City v. Morris Canal, 12 N. J. Eq., 548.

Newark Lime Co. v. Newark, 15 N. J. Eq., 64.

In re Wells Avenue, 4 N. Y. Supp., 300.

If the owner of the shore, even by virtue of legislative authority, builds a wharf across the end of a street, the effect will not be to close the thoroughfare, but the street will extend across the wharf to the water's edge.

Buffalo v. Railroad Co., 190 N. Y., 84; 82 N. E., 513.

In the leading case on this subject, decided in New York in 1847, the facts were that the owner of land on the East River, through which a street had been extended to tidewater, was expressly authorized by the legislature to construct wharves, docks, bulkheads and piers on the land under water in front of his own land. This he did, filling up the intervening space. Conceding that his works were strictly in accordance with the authority conferred by the statute, the court held that the street still extended across them and over the bulkhead to the water, saying:

“Although the owner of the land on the shore has for his own benefit filled up the waterway in front of the original terminus of the street, this should not be allowed to destroy the right to pass directly between the street and the river, a result which can only be attained by an extension of the street commensurate with the now solid but new-made ground.”

People v. Lambier, 5 Denio, 9.

The decision of the Supreme Court of the United States in what is known as the Hoboken case is sometimes cited as an authority to the contrary. In 1873 the New Jersey courts had decided that a street dedicated by plat as extending to tidewater continues by operation of law to extend to tidewater across lands reclaimed by a corporation under legislative authority.

Hoboken Land and Improvement Co. v. Hoboken, 36 N. J. L., 540.

But in subsequent cases, where the legislature made an absolute grant of the submerged lands to a corporation, instead of merely authorizing the corporation to reclaim and use the lands, it was held that the street was cut off short at its original terminus.

Hoboken v. Pennsylvania R. R. Co., 124 U. S., 656.

Elizabeth v. Central R. R. Co., 68 N. J. Eq., 198.

It must be remembered that the several states are the final judges of their own law with respect to the title to submerged lands, and are not bound by the decisions of the Supreme Court of the United States.

Shively v. Bowlby, 152 U. S., 1.

Revell v. People, 177 Ill., 468.

The Hoboken decision may be good law in New Jersey, but it cannot be accepted as determining the law in Illinois. By a local rule of the common law obtaining in New Jersey the owner of land on tidewater could, unless prevented by the state, fill in the shallows and thereby acquire title to the area reclaimed.

Gough v. Bell, 22 N. J. L., 441.

For some years it was there an open question whether the state could convey the submerged land to a stranger and thus destroy the riparian rights of the owner of the shore, but it was finally decided by a divided court that the shore owner had no riparian rights as against a grantee from the state of the submerged flats.

Bell v. Gough, 23 N. J. L., 624.

State v. Jersey City, 25 N. J. L., 525.

Stevens v. Paterson R. R. Co., 34 N. J. L., 532.

Of this harsh doctrine, which prevails in a few other states also, the Hoboken decision was a natural corollary, but in Illinois a riparian owner's access to the water is a property right which cannot be destroyed by the state except under the power of eminent domain.

Commissioners of Lincoln Park v. Fahrney, 250 Ill., 256, 264.

Miller v. Commissioners of Lincoln Park, 278 Ill., 400, 404, 408.

But even if the State of Illinois possessed power to deprive a shore owner of his access to the water without compensa-

tion, and if that power included the right to close a public street extending to the water's edge, still there is nothing in the legislation of the General Assembly indicating an intention to make an absolute grant to the Illinois Central Railroad Company in derogation of the right of the people. In 1869, as will be seen, the General Assembly did indeed assume to make an absolute grant to the company of the bed of Lake Michigan for a mile from the shore, but the act was adjudged to be void as violative of the trust upon which the submerged lands were held by the state for the benefit of the people.

Illinois v. Illinois Central R. R. Co., 146 U. S., 387.

The title acquired by the company and confirmed by the decree in the Lake Front case was not by virtue of an absolute grant such as was involved in *Hoboken v. Pennsylvania R. R. Co.*, 124 U. S., 656, but rather by virtue of a license to reclaim, similar to the license which, in *Hoboken Land and Improvement Company v. Hoboken*, 36 N. J. L., 540, was held not to prevent a street from being extended to tide-water across the reclaimed land.

Lake Front Decree as an Adjudication.

The decree in the Lake Front case is said to be a formal adjudication confirming in the Illinois Central Railroad Company the title to all of the made lands, including so much of the area as would fall between the lines of the streets produced in an easterly direction. A careful review of the proceeding is necessary in order to determine how far the title to the streets was actually involved in the issues decided.

The Illinois Central Railroad Company was incorporated in 1851 by an act giving it authority to appropriate for the uses set forth in the act a right of way two hundred feet wide, and to enter upon, take possession of and use any land, streams and materials for depots, station grounds, engine

houses, shops and other buildings "necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road." Section 3 further provided that "all such lands, waters, materials and privileges belonging to the state are hereby granted to said corporation for said purposes," but no authority was conferred to locate tracks in any city without consent of the common council. Such consent to enter the City of Chicago was given by the ordinance of June 14, 1852 (Special Ordinances 1915 edition, page 861), authorizing the company to construct its railroad along the margin of the lake northerly to such grounds as it might acquire north of Randolph street in Fort Dearborn Addition, upon which grounds should be located the company's depot, and such other buildings, slips or apparatus as might be necessary or convenient for its business. The company was further authorized to extend its works and fill out into the lake to a line running south from a designated point in the southern pier parallel with Michigan avenue to the north line of Randolph street extended. Along this line the company built its breakwater and filled up the intervening space. The location of these works is shown upon the Morehouse map, a copy of which is incorporated as a part of the decree in the Lake Front case and may be seen in the official reports of the decision.

By the Lake Front Act of April 16, 1869, the General Assembly of the State of Illinois undertook to grant to the company in fee all the right and title of the state to the submerged lands for a distance of one mile to the east of the tracks and breakwater between the south line of the south pier extended east and a certain line south of Twelfth street defined in the act. This statute was accepted and acted upon, but was repealed in 1873. The company, denying the validity of the repeal, made extensive plans for the development of the Chicago harbor for general commercial purposes, and in 1883 the Attorney General of the State of Illinois filed an infor-

mation on behalf of the state to determine the rights of the Railroad Company, making the Illinois Central Railroad Company and the City of Chicago parties defendant.

As between two defendants who have merely answered the bill of complaint a decree in equity does not ordinarily operate as a technical adjudication of their rights. In order to give it the effect of a formal estoppel there must be a direct issue upon the pleadings between the parties who are to be thus concluded. The only issues joined in the Lake Front case between the two defendants were those raised by the cross bill of the City of Chicago and the answer of the Illinois Central Railroad Company to the same.

The cross bill was filed primarily for the purpose of settling the title of the city to what is now known as Grant Park, and establishing the city's right, supposed to be incidental to such riparian ownership, to fill in the bed of the lake and develop the harbor of Chicago. Harbor development was the real bone of contention between the city and the railroad company.

Fractional Section 15 was subdivided by the Canal Commissioners in 1836 by a plat known as Fractional Section Fifteen Addition to Chicago, upon which all the space between the west line of Michigan avenue and the lake, extending from a point 200 feet north of Twelfth street to Madison street, was left blank. (Pr. Rec., 183.) This open area was continued from Madison street to the north line of Randolph street by the plat of Fort Dearborn Addition to Chicago, upon which it was specifically designated as "Public Ground." The contention of the city, sustained by the decree of court, was that by virtue of these plats the city acquired title to the open tracts precisely as it acquired title to the streets, and that the city was consequently the owner of all the riparian rights from Randolph street to within 200 feet of Twelfth street. One of the city's main arguments was that

this open space, several hundred feet in width, was a part of Michigan avenue, at least as far north as Madison street, and there was no controversy whatever about the title to the streets except as involved in this contention. The cross bill goes at length into the facts relating to the open space in Fractional Section 15 south of Madison street; and then, as a part of the same argument, proceeds to allege (Pr. Rec., 112) that the city is the owner in fee of “that portion of Fractional Section 10 mentioned in said amended information which lies east of Michigan avenue and north of said Fractional Section 15 *to the north line of Randolph street*”; that the plat of Fort Dearborn Addition was recorded June 7, 1839, and “the said plat, under and by virtue of the laws of the State of Illinois then in force, became and was a conveyance of all *that portion* of said Section 10 to the municipality known as the City of Chicago,” to be held in trust “for the public use indicated by the designation upon the face of said plat”; also “that said plat was certified, executed and recorded in all respects in conformity with the then laws of the State of Illinois in regard to platting, and that the fee of all streets, avenues, alleys and public grounds shown thereon passed to your orator (the city) by virtue of said plat.” The cross bill, after further stating that the north part of Fort Dearborn Addition was retained by the United States as a reservation until about 1850, when the streets projected across the same were thrown open to the public, continues:

“And your orator says that its ownership of the streets and alleys and public grounds in that portion of said plat which remained in the occupancy of the United States was in abeyance until the vacation of the said ground by the Government, but that your orator became the owner in fee thereof subject to such occupancy, which terminated as aforesaid about the year 1850; and your orator further says that it has, and has had since June 7, 1839, the control and use for public ground of that part of said fractional section 10 mentioned in said

amended information which lies east of Michigan avenue and *north of said fractional section 15 to Randolph street*, and subject to such use is the owner in fee thereof, and has been such since the recording of the plat of Fort Dearborn Addition as hereinbefore mentioned."

All this is merely incidental to the real purpose of the cross bill, which as already indicated was to test the right of the Illinois Central Railroad Company to appropriate a square mile of the bed of Lake Michigan and develop it as a commercial harbor. This right was claimed by the railroad company not only by virtue of the Act of April 16, 1869, but by virtue of its alleged ownership of the shore. The city, on the other hand, also based its claim of an exclusive right to develop the harbor upon its title to the shore, and the main issue, under the view taken by the parties of the law of riparian ownership, was whether the city or the railroad company was the owner of the riparian rights. Accordingly the cross bill proceeds to insist that the city is the riparian owner of the parts of fractional sections 15 and 10 above mentioned, and is

"the owner of and entitled to uninterrupted access to the water along the whole line of said Section 15 and of said portion of said Section 10, and of the right to construct wharves, piers, quays, slips and landing places, and of the right of reclamation, and to create a harbor for the City of Chicago upon the shore of the said lake in front of said fractional section 15 and said portion of said fractional section 10."

The cross bill then challenges the validity of the Lake Front Act of April 16, 1869, in so far as it undertook to grant the bed of the lake to the Illinois Central Railroad Company for general harbor purposes, and concludes with a prayer for confirmation of the city's title to the park areas, and of its exclusive right to develop the harbor.

No issue is tendered in this cross bill with respect to street extensions over reclaimed land or even over natural accretions, and no such question was formulated or litigated in the

entire proceeding. The allegations regarding the title to streets are introduced merely by way of argument in support of the claim of riparian ownership along the lake front, with the supposedly incidental right of reclamation and general harbor development, which was the question actually litigated.

The Illinois Central Railroad Company answered the cross bill at length (Pr. Rec., 151), questioning whether the plat of Fort Dearborn Addition was executed with the formalities prescribed by the statute so as to operate as a conveyance of title to the streets, but insisting that the question was immaterial "inasmuch as the said plat and subdivision embraced only that portion of fractional section 10 lying south of the Chicago River and west of the shore line of Lake Michigan, and did not purport to grant and did not grant any title or easement or public right in the open waters of said lake." The answer admits the facts alleged in the cross bill about the streets in the north part of the Addition reserved until about 1850, and then proceeds (page 157):

"But this defendant denies that the said City of Chicago, by virtue thereof, acquired any other or different interest in the streets so opened and occupied than it had previously acquired to streets in other portions of said subdivision; and this defendant also denies that any of the streets in that portion of said subdivision so reserved, or any public ground therein, bordered upon or came in contact with the shore line of Lake Michigan; that between Michigan avenue as extended through said subdivision to the Chicago River and the shore of said lake was interposed a series of lots and parcels of land bounded by said lake upon the east, and which were sold by the United States to private purchasers and the title to which was subsequently conveyed in and by the United States, or the purchasers and grantees of the United States, to this defendant, The Illinois Central Railroad Company, and that by virtue of such purchases and the conveyance made to this defendant in pursuance thereof this defendant became and ever since has been the owner of the land in said subdivision fronting on Lake Michigan, lying north of Randolph street, in the City of Chicago, and between said street and the Chicago River, and

vested thereby with all the rights and privileges of a riparian owner in respect to the same."

All of this is aimed, not to raise an issue about the ownership of streets, but to set forth the admitted fact that in the part of the subdivision north of Randolph street there was not, as in the areas south of Randolph street, any platted street running parallel with the lake and extending thereto, upon the existence of which a claim of riparian proprietorship could be rested by the city.

The answer then denies that the city has ever been a riparian owner of any part of fractional sections 15 or 10, "or that it is or ever has been, in any proper or legal acceptance of the terms, the owner of and entitled to uninterrupted access to the water along the line of said Section 15 or any portion of said Section 10," and denies that the city has the right to construct wharves, reclaim land or develop harbors in front of the same. The answer is voluminous, but it is believed that the foregoing statement includes the pertinent portions thereof.

It will thus be seen that no issue is raised by the pleadings with respect to streets in or over the made lands; especially in view of the fact that no formal issue could have been raised in the answer by allegations not responsive to those of the cross bill.

In this state of the record, the United States Circuit Court entered its decree September 24, 1888, finding and adjudging among other things that "the fee of all the streets, avenues, alleys and public grounds shown upon the plat" of Fort Dearborn Addition, including the open space south of Randolph street marked "Public Ground," and also the fee of the open space on the plat of Fractional Section Fifteen Addition to Chicago, was "in the City of Chicago in trust for public use"; also that the city as riparian owner had power, subject to government regulation, to erect and maintain along

all that part of the lake front public landing places, wharves, docks and levees. The decree then proceeds as follows:

“That the Illinois Central Railroad Company is the owner in fee of all the wharves, piers and other structures erected by it in the City of Chicago, east of Michigan avenue, south of Chicago River, and north of the north line of Randolph street extended eastwardly, as shown upon said Morehouse map, including the station grounds lying west of the slip C, the pier marked C lying east of slip C, and represented upon the Morehouse map to have been built in 1867, and piers 1, 2 and 3 lying east of pier C last mentioned, and represented upon said map to have been built as follows: pier 1 in 1872 and 1873, pier 2 in 1881, and pier 3 in 1880, and is also entitled to the use, for purposes of its business, of the slips marked on said Morehouse map.”

The decree then proceeds to determine the effect of Section 3 of the Lake Front Act of April 16, 1869, the material provisions of which section were as follows:

“The right of the Illinois Central Railroad Company under the grant from the state in its charter * * * and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control, in and to the lands, submerged or otherwise, lying east of the said line running parallel with and four hundred feet east of the west line of Michigan avenue in fractional sections ten and fifteen, township and range as aforesaid, is hereby confirmed, and all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one * * * are hereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns.”

The disposition made by the court of the railroad company's claims under this section can best be seen in the following extract from the decree:

“And the court doth further find and declare, and it is hereby adjudged and decreed, that the third section of the

act of the General Assembly of the State of Illinois, passed over the Governor's veto April 16, 1869, entitled 'An act in relation to a portion of the submerged lands and lake park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the City of Chicago,' so far at least as it confirms 'the right of the Illinois Central Railroad Company under the grant from the state in its charter, * * * and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control, in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan avenue in fractional sections ten and fifteen,' is a valid and constitutional exercise of legislative power and legalizes as well what was done by said company prior to April 16, 1869, in the way of filling in the lake and constructing wharves, piers, tracks, warehouses and other works between the Chicago River and the north line of Randolph street extended eastwardly as its occupancy and use for way ground of the two said triangular pieces of ground immediately south of Randolph street; and that the subsequent act of the General Assembly of Illinois, passed April 15, 1873, in so far as it sought by repealing the said Act of April 15, 1869, to revoke or annul said confirmatory clause of the last named act, was void under the Constitution both of Illinois and of the United States; but the court is of opinion, and so adjudges and decrees, that the said Act of April 15, 1873, repealing said Act of April 16, 1869, had the effect in law to withdraw from said railroad company the grant to it, its successors and assigns, by the third section of said Act of April 15, 1869, of 'all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan and lying east of the tracks and breakwater of the Illinois Central Railroad Company for the distance of one mile and between the south line of the pier extended eastwardly and a line extended eastward from the south line of Lot twenty-one south of and near to the roundhouse and machine shops of said company, in the south division of said City of Chicago'; and to reinvest the state with such right and title as it had in and to said premises prior to the passage of said Act of April 16, 1869; and said repealing act had the further effect to withdraw from said company

the additional power conferred upon it by said Act of April 16, 1869, to improve the harbor of Chicago, and to engage in the business of constructing and maintaining wharves, piers and docks for the benefit of commerce and navigation generally, and not in the prosecution of its business as defined and limited by its original charter and the laws of the state.”

Lot 21 referred to in the decree and in Section 3 of the Act of April 16, 1869, was south of Fourteenth street.

When the case came before the Supreme Court of the United States on appeal the foregoing decree was affirmed in substance, an order being entered April 10, 1893, containing this clause:

“It is now here ordered, adjudged and decreed by this court that the State of Illinois is the owner in fee of the submerged lands constituting the bed of Lake Michigan which the third section of the Act of April 16, 1869, purported to grant to the Illinois Central Railroad Company, and that the Act of April 15, 1873, repealing the same is valid and effective for the purpose of restoring to the state the same control, dominion and ownership of said lands that it had prior to the passage of the Act of April 16, 1869.”

The only other modification of the decree of the court below consisted in the direction of an inquiry whether certain piers interfered with practical navigation, and “except as modified in the particulars mentioned” that decree was affirmed.

From an inspection of the record, it is plain that the only question raised by the parties or determined by the court with respect to the legal sufficiency of the plat of Fort Dearborn Addition had to do with the title to the “public ground” south of Randolph street and to the supposed riparian rights of wharfage and reclamation, with special reference to harbor development. There was no dispute about the title to the streets, nor about their eastern termini. If the Illinois Central Railroad Company raised any such question at all

by the passages above quoted from its answer, the averments of that paragraph were not responsive to anything alleged in the cross bill, and two parties are needed to make an issue.

“The cases are substantially agreed as to the rule, but the difficulty arises in its application, in determining what is to be understood by the ‘matters in issue’ upon the former trial and what is meant by a judgment directly upon the same matter. * * * It may be stated generally that by ‘matter in issue’ is to be understood that matter upon which the plaintiff proceeds by his action and which the defendant denies or controverts by his pleadings.”

Kitson v. Farwell, 132 Ill., 327, 339.

In other words, an issue cannot be accepted by a defendant until it has been tendered by an acting party. It is true that parties who have actually litigated a question are often estopped to reopen it, even though it may not have been formulated in a solemn manner by the pleadings. It is also true that a question necessarily involved in the decision may be regarded as settled thereby even though never formally raised or argued. The record in the Lake Front case, however, fails to show that the title of the city to the street ends was tendered in an issue formally joined, or was actually litigated, or was so involved in the litigation as to be necessarily determined by the decree and in my opinion it does not preclude the city from extending the street, or asserting its rights therein, over the reclaimed territory.

Adverse Possession and Abandonment.

If the city has otherwise a right to extend the streets across the made land, the question still remains whether it has lost the right by failing to make timely assertion of the same. This is the question which in my judgment presents the most serious obstacles to the city's claims.

Streets are held for the benefit of the public and neither

mere adverse possession nor mere nonuser will debar the city from asserting its title in behalf of the public.

In *Village of Lee v. Harris*, 206 Ill., 428, 437, the court said:

“The fact that a number of the streets and alleys had never been improved by the village and had been for some years within the enclosure of private persons had no potency to defeat the action of the village. Whether the interests of the public require that a street or alley shall be improved or that repairs thereon are necessary is committed to the judgment and discretion of the governing board of the city or village. Mere adverse possession by a lot owner of a portion of a public street, however long continued, does not, by virtue of the statute of limitations, bar the right of the public to be restored to possession of the street to its full width. * * * Mere nonuser of a street or alley, no matter how long continued, does not deprive the city or village, as the representative of the public, of the right to take possession thereof and improve the same.”

In *City of De Kalb v. Luney*, 193 Ill., 185, the court uses the following language:

“Cases have been presented to courts of equity wherein the circumstances were such that right and justice demanded the public should be deemed estopped to assert the right to become repossessed of a street or highway which had long been abandoned to the use of private parties. That the possession of a portion of the street or highway has been allowed to remain for any period of time in the possession of the private party is not sufficient to create the estoppel. Nor could any act or acts of abandonment of the street by those in authority in the governing body of the city, no matter though expressly made and declared, operate to create the estoppel, for it is not within the lawful exercise of the power of such authorities to abandon the streets which they hold for the use of the public, so that by the mere act of abandonment rights of the public therein may be lost. It must appear, to create an equitable estoppel against the public in cases such as that at bar, not only that the city authorities have long withheld the assertion of control over the portion of the street in question, and that private

parties have been, by the acts of those representing the public, induced in good faith to believe the street has been abandoned by the public, but also that on the faith of that belief and with the acquiescence of those representing the public such private party has erected structures on the street, or made improvements thereon of such lasting and valuable character that to permit the public to assert the right to repossess itself of the premises would entail such great pecuniary loss and sacrifice upon the private property holder that justice and right would demand that the public be estopped.”

In accordance with the principles indicated in the foregoing extract, cities have often been held to be estopped from asserting the right to a public street when valuable improvements have been permitted to remain in the street for a long time unchallenged.

In *Peoria v. Central National Bank*, 224 Ill., 43, the court says, at page 66:

“We agree fully with the contention of the city that the statute of limitations as to adverse possession does not run against a municipal corporation in respect to the property held by it for public use, and that on the ground of adverse possession alone the court would not be justified in upholding the contention of the appellee. But the city allowed private parties to occupy the premises for more than sixty years. Buildings have been erected on the eastern part of the premises on a part of the so-called dedicated street, and have stood on the premises continuously from the early forties down to the present time. * * * Docks were constructed at a very large expense in 1886 with the consent of the city authorities. It would be unjust and inequitable to allow the public authorities now to interfere.”

In *Reichert Milling Company v. Village of Freeburg*, 217 Ill., 384, a municipality was held to be estopped from claiming a street by reason of its acquiescence for nearly fifty years in the occupation of the premises by yards, mill ponds and other improvements privately owned, and the court said:

“The plat was made in 1854, and for about fifty years prior to the commencement of this suit Temple street

west of Walnut street remained closed to the public. While the statute of limitations would not run against the village during that time, the defense of equitable estoppel by reason of an abandonment consequent upon nonuser we think properly invoked by the appellant. * * * The premises west of Walnut street were fenced and the public were excluded therefrom except through a gate. These conditions were acquiesced in by the village for so long a time that to require the appellant to now reconstruct its mill ponds and rearrange its yards, which would cost it a considerable sum of money, would clearly be inequitable."

Perhaps the latest expression of the Supreme Court on this subject is the following from *Chicago v. Lord*, 276 Ill., 571:

"A public highway may be abandoned, but the public rights cannot be divested by mere nonuser. There must not only be a cessation by the public authorities to assert control over the highway, but there must be an obstruction by some private person on the faith that the highway has been abandoned, and such obstruction must have been acquiesced in by the public authorities."

It would be impossible to reconcile all the Illinois decisions regarding the effect of adverse possession, nonuser, and abandonment upon the status of a public street. There are cases in which a highway has been held to be abandoned by nonuser, but in most of these the public had adopted some other thoroughfare, or the question related only to part of the width of the highway, or elements of estoppel actually existed. A city is under no obligation to improve a street within any particular period of time, and it is believed that there are no well considered decisions in this state justifying the view that mere inaction will prevent a city from opening and extending a public street in which no valuable improvements have been installed by private parties and permitted by the city to remain.

There have been exhibited to us seven affidavits made by employees of the Illinois Central Railroad Company in January, 1919, relating to the area between the Chicago River

and Randolph street east of Beaubien court. These affidavits, if accepted as true, show that, with unimportant exceptions, for some twenty years or more last past the railroad company has at its own expense installed and maintained all the paving, sewers, lighting system, gas and water mains and pipes in this territory and has pumped its own water supply, also maintaining trespass signs in South Water street at the coal chute and between its outfreight and fruit houses. The statements embodied in these affidavits, if conceded to be accurate, do not seem sufficient to establish a case for estoppel of the city to enforce its rights. The city was not bound to improve its streets, or extend its water mains and other utilities upon the same, until it saw fit to do so. Failure of the authorities to repair a road may in certain cases be evidence that it is not regarded as a highway, but not unless the road needed repair.

Lewiston v. Proctor, 27 Ill., 414.

So long as the railroad companies saw fit to improve the streets and to supply themselves with water and light, instead of calling upon the city for such service, no reason is perceived why the city was under any obligations in the matter; and in the absence of circumstances sufficient to raise an estoppel, the views from time to time entertained by public officials with respect to the rights of the city in and over its streets would seem to be quite immaterial.

It remains to apply the foregoing principles to each of the three streets involved in the present inquiry.

Lake Street.

Lake street is drawn on the plat of Fort Dearborn Addition as running east of Michigan avenue 97.3 feet to the lake, but accretions had doubtless occurred before 1852, when the Illinois Central Railroad was admitted to the city by virtue of

the ordinance of June 14, 1852. The company was given right of way to such grounds as it might acquire north of Randolph street "upon which said grounds shall be located the depot of said railroad within the city, and such other buildings, slips or apparatus as may be necessary or convenient for the business of the company." (33 Fed. Rep., 741.) The passenger station was in fact built 240 feet north of Randolph street, extending north 505 feet and located about 184 feet east of Michigan avenue, according to Roswell B. Mason's affidavit appearing on page 282 of the printed record in the Lake Front case. Eventually the city council passed an ordinance September 10, 1855 (Handy Abst., 172; Pr. Rec., 631; 33 Fed. Rep., 744), granting permission to the company to curve its tracks westward in order better to approach the passenger depot. This grant was upon condition "that the said company shall lay out upon its own land, west of and alongside its passenger house, a street fifty feet wide, extending from Water street to Randolph street, and fill the same up its entire length within two years from the passage of this resolution." This fifty-foot street was originally called Central avenue, and later Beaubien court.

The stipulation that it should be laid out by the company "on its own land" would not necessarily negative the existence of a street-crossing at Lake street, but as a matter of fact the station was built directly across Lake street with the open acquiescence of the city authorities. There was recorded January 21, 1856, a plat of a resubdivision by the Illinois Central Railroad Company of Block 6 and part of Block 11, showing Lake street terminating at Central avenue, the westerly line of which is represented as being 130.2 feet east of Michigan avenue. After the fire a copy of this plat from the company's files was approved by the Board of Public Works, and recorded May 13, 1873. There is now an old brick wall along the east side of Beaubien court opposite the end of Lake street, and substantial buildings stand farther

east, across the line of Lake street extended, between the brick wall and the lake. No evidence has been submitted of any assertion during all the intervening years by the city or the public of rights in Lake street east of Beaubien court, and in default of such evidence the conclusion clearly follows that the city, by condoning the operations of the Illinois Central Railroad Company and permitting valuable buildings to stand unchallenged, has lost whatever right it may once have had to extend Lake street in an easterly direction beyond its present terminus.

South Water Street.

The shore cuts off South Water street on the plat of Fort Dearborn Addition 132 feet east of Michigan avenue. At the present time the street crosses Beaubien court, but is obstructed farther east by the old stone in-freight house of the Illinois Central Railroad Company, which juts across the street from the north nearly to the south line thereof. This encroachment is apparent upon casual inspection, and is also shown on various maps and diagrams, some of which are hereinafter referred to. From these, and from an examination of the premises, the distance between the east line of Michigan avenue and the west wall of the stone freight house appears to be approximately 560 feet. There is also a less substantial and less extensive encroachment upon the northerly part of the street between the in-freight house and Beaubien court.

The Committee of the City Council on Streets and Alleys, S. D., according to Document No. 544 in the city clerk's office, filed a report July 13, 1854, recommending construction of a sidewalk on both sides of South Water street "between Michigan avenue and the grounds of the Illinois Central Railroad," and it was so ordered. The distance is not shown. In 1864, according to an uncertified copy of the deed exhibited to us, the Illinois Central conveyed to the Michigan

Central Railroad Company two tracts of land, one of which is 250 feet east of Michigan avenue and runs from the south pier to the north line of "South Water street extended easterly," and the other of which runs south from that line and includes part of the area that would fall in South Water street extended east from Beaubien court. Measured along the projection of the north line of South Water street, the distance indicated by this deed between the east line of Michigan avenue and the west wall of the old stone freight house is 562.15 feet. The deed contains this clause:

"It is expressly understood by the parties hereto that the said last described tract of land is conveyed subject to a right of way which is expressly reserved for a highway or street which shall be a continuation of South Water street and of equal width with South Water street across the same for the convenience of the public, and especially of all doing business with the Illinois Central Railroad Company, always to be kept open and unobstructed by cars or engines standing there except as may be indispensably necessary in switching or connecting or disconnecting cars."

Rufus Blanchard's map of Chicago published in 1869, a copy of which appears on original page 1196 of the printed record in the Lake Front case, showed Lake street as terminating opposite the depot, but South Water street as running past and beyond it. The freight house appears farther east as an encroachment on the street, but with an open passageway south of it. Another map attached to the record in the Lake Front case, original page 1204, shows the freight house standing practically across South Water street, which swerves irregularly to the south and merges in the railroad yards beyond; and the Morehouse map, adopted as a part of the decree in the Lake Front case, exhibits substantially similar conditions.

As regards the stretch between Beaubien court and the freight house the reservation for a "highway or street" in the above-quoted clause of the deed to the Michigan Central

Railroad Company recognizes or creates a right of the public to the use of the street, and no evidence of a decisive character has been produced to show an abandonment of this part of the street or an estoppel to assert the rights of the public therein.

It is believed that the city would be estopped from removing the end of the freight house as an obstacle to traffic. There is, however, at the present time an open thoroughfare which veers to the south so as to clear the end of the freight house and is used as an extension of South Water street to the railroad yards beyond. While this passage could not be regarded as a true extension of South Water street arising solely by operation of law from the natural or artificial advance of the shore line, it might well be deemed a practical continuation of South Water street, either by reason of its having been adopted as such by common consent, or by virtue of long use by the public under a claim of right.

Where there is a regularly traveled and unobstructed road across an open tract of land used by the public without permission from anyone for a sufficient length of time a right of way is established by prescription.

Phillips v. Leininger, 280 Ill., 132.

Thorworth v. Scheets, 269 Ill., 573.

Hansen v. Green, 275 Ill., 221.

Middletown v. Glenn, 278 Ill., 149.

“Where the proof shows uninterrupted use by the public of an alleged street or alley for the period necessary to establish a street or alley by prescription, the burden is on the owner of the land to show that such use was under some license, indulgence or special contract inconsistent with the claim of right by the public.”

Wiehe v. Pein, 281 Ill., 130, 141.

Law v. Neola Elevator Co., 281 Ill., 143, 149.

Thorworth v. Scheets, 269 Ill., 573.

Phillips v. Leininger, 280 Ill., 132, 140.

The Supreme Court of Illinois has, it is true, often stated, as in *Chicago v. Chicago, Rock Island and Pacific Railway Company*, 152 Ill., 561, that in order to establish a way by prescription the use "must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land in or over which the easement is claimed." Again, in *Village of Peotone v. Illinois Central R. R. Co.*, 224 Ill., 101, the court, while holding that a public right had in that case been acquired in fact as against the company, "conceded that where grounds are near to a railroad depot and freight yards, more pronounced acts on the part of the public should be required before the conclusion is reached that the public has acquired the right to the premises as a highway than might under other or ordinary circumstances be required." It would be difficult to harmonize all of the decisions, chiefly because each case stands on its own facts as determined by the entire evidence, but the later decisions above cited indicate a clear tendency to recognize public travel for the statutory period as sufficient to raise the presumption that a public highway exists.

There are numerous cases involving deviations by the public from a legal highway, either to avoid obstacles or for other ends of convenience, and the law is that travel over the substituted road will in due course of time result in an abandonment of the original road or street as established by law and the acquisition of right and title to the new thoroughfare.

Grube v. Nichols, 36 Ill., 92.

Peoria v. Johnston, 56 Ill., 45, 51.

Champlin v. Morgan, 20 Ill., 181.

Galbraith v. Littiech, 73 Ill., 209.

Brockhausen v. Bochland, 137 Ill., 547.

Highway Commissioners v. Kinahan, 240 Ill., 593.

People v. C. C. C. & St. L. Railway Co., 269 Ill., 555.

If the public street extends to the freight house, the right of the city to go farther east by adopting the road as now traveled depends on the nature of the use and occupation of the same over a term of years under circumstances not sufficiently disclosed in the documents submitted for inspection. It is said that a right of way cannot be acquired by the public over private property when the way is used only by persons resorting to it for purposes connected with the business of the owner. No such limited use is affirmatively shown by the documents or other evidence examined. The law does not fix the number of persons who must travel upon a road to establish its existence, and a highway may be acquired by prescription even though it is a mere cul-de-sac with a dead end.

37 Cyc., 22.

State v. Rixie, 50 Wash., 676; 97 Pac., 804.

Gillespie v. Duling, 41 Ind. App., 217; 83 N. E., 728.

Many decisions have been cited in which the fact that a way over private land led to no point beyond has been referred to as one of the circumstances leading to denial of the existence of a public highway. They are entitled to consideration, but fail to establish any fixed rule of law which would necessarily conclude the rights of the city in this case.

The entire evidence thus far available does not justify a positive opinion as to the legal status of South Water street east of Beaubien court, but the weight of the authorities and of the evidence supports the conclusion that the city has the right to extend and occupy South Water street in a direct extension east of Beaubien court for a distance of 381.95 feet, and by a diversion along the line of the traveled roadway east of that point to Lake Michigan, the exact location and dimensions of such roadway being dependent on evidence not now available to us.

River Street.

The distance along River street from Michigan avenue to the lake, as it appears on the plat of Fort Dearborn Addition, is about 232 feet. River street lay within the marine hospital reservation, and had not come under full jurisdiction of the city when, by a deed already mentioned bearing date of October 14, 1852 (Graham Report, p. 81) a copy of which, re-recorded after the fire, may be seen in the Recorder's office in Book 647 of Records, page 505, conveyed to the Illinois Central Railroad Company a tract of land 250 feet east of Michigan avenue, and bounded on the north and east by the river and the lake. A plat was attached. The area thus granted stands squarely across River street, but it is doubtful whether the conveyance in itself would have had the effect of terminating the street at that line. If River street, which appears on the Government plat as a highway leading to navigable water, was in fact a street, it would by operation of law have extended across the accretions to the new shore line before and at the time when these accretions were conveyed to the railroad company. The decision in *United States v. Chicago*, 7 How., 185, was merely that the city could not open up Michigan avenue and the other platted streets across the hospital reserve while still occupied as such. The title to the streets may have remained in abeyance until the land was sold, but the dedication cannot be regarded as a nullity, since it became effective eventually. After the Government occupation ceased the streets became public and no sufficient reason is apparent for distinguishing in this respect between the 232 feet of River street actually shown upon the plat and the extension of the same by accretion. If, as seems probable, the United States could not have destroyed Michigan avenue by selling and conveying the hospital reserve to private purchasers as an entire tract, it could not by conveyance to a

private corporation destroy River street either as originally laid out upon the plat or as extended by accretion. All parties, indeed, recognize the extension of River street over accretions for a distance of 18 feet from the terminus as shown by the plat to the 250-foot line. If River street extended across the hospital reserve to that line in 1852, it must have extended beyond to the shore.

It is true that in 1852, when the deed was made to the Illinois Central Railroad Company, the Government had not relinquished its control of the parts of the platted streets crossing the hospital reserve. In a communication to Secretary of War Jefferson Davis dated September 26, 1855, relative to certain lots which had been granted to Jean Baptiste Beaubien by Congress, Colonel Graham recommended that he be authorized to open Michigan avenue and River street "to the extent laid down" on the plat of Fort Dearborn Addition, "and that the municipal jurisdiction over the said portions of the said streets be surrendered to the corporate authorities of the City of Chicago so soon as the public buildings thereon can be disposed of and the public property stored therein moved out" (Graham report, p. 78). It may be conceded that neither he nor the municipal authorities at that time regarded River street as extending across the accretions deeded to the railroad company. Ignorance of their rights, however, would not alone have debarred the city officials from asserting those rights when ascertained.

The same may be said of certain other proceedings supposed to show acquiescence in the claims of the railroad company with reference to the limits of River street. An ordinance of August 11, 1864 (Document No. 356 in the city clerk's office, referred to in the Inman report), requires River street to be graded and planked "from Michigan avenue east to the lands of the Illinois Central Railroad Company." The accompanying report shows that the improvement was adjacent to Block 5, presumably a distance of 250

feet. Document No. 1255, being an approved report from the Committee on Wharves and Public Grounds under date of May 3, 1867, on the application of A. E. Goodrich to lease wharfing privileges "on that part of River street lying east of Michigan avenue and west of the grounds of the Michigan Central Railroad," states that the distance is 250 feet according to the record, and that the width of the space from the south line of the street to the north face of the dock is 67 feet. By another ordinance adopted October 24, 1879 (Document No. 753), River street was ordered to be paved from Wabash avenue to a line 250 feet east of Michigan avenue.

The deed of March 22, 1864, hereinabove referred to in the discussion of the status of South Water street, purports to be a conveyance from the Illinois Central Railroad Company to the Michigan Central Railroad Company of a tract of land 250 feet east of Michigan avenue extending south from the pier, but subject to a *private* right of way forty feet wide at the north end thereof. The city was not a party to this conveyance and is not bound by its terms or recitals.

A more serious question, perhaps, arises out of the terms of an agreement of September 26, 1855, formally entered into by and between Jean Baptiste Beaubien, the Illinois Central Railroad Company, the City of Chicago, and the United States of America (Graham report, p. 79). This instrument was designed to set at rest certain controversies about the line defining the south limit of excavation for the improvement of navigation of the Chicago River.

The mayor and common council of the City of Chicago had addressed to the Senate of the United States January 15, 1852, a memorial asking permission to straighten the channel of the river by cutting off and excavating a part of the hospital reserve "as per the *red line* marked on the accompanying map." (Graham report, p. 83.) Congress accordingly passed an act July 21, 1852, authorizing the corporate

authorities of the City of Chicago to excavate such portion of the reservation, "not exceeding the limits described in their memorial," as might be necessary according to the plan set forth in said memorial, for the improvement of the navigation of the Chicago River (Graham report, p. 83). There was nothing in the act to fix the limits of excavation except the "red line" marked on the map accompanying the memorial.

In the deed of October 14, 1852, from the United States to the Illinois Central Railroad Company, to which a map was annexed, the west line of the grant was described as a line 250 feet east of Michigan avenue running north to the piers on the Chicago River at a point marked "2" on said map, and the north boundary was described as a line running with said piers from said point "2" eastward to the low-water mark of Lake Michigan, "subject, however, to the right of the City of Chicago to make an excavation for improving the navigation of the Chicago River," in accordance with the Act of July 21, 1852, "without any claim for indemnity or reimbursements of any part of the price above mentioned in consequence of such excavations if made." The railroad company was therefore a party vitally interested in the location of the "red line" of the memorialists.

Before further action was taken, Congress by an act approved August 1, 1854, entitled "An Act for the relief of Jean Baptiste Beaubien," authorized the commissioner of the general land office to issue patents to Beaubien for certain described lots in Fort Dearborn Addition to Chicago, including all that part of Lots 8 and 9 in Block 2 south of the line of excavation authorized by the Act of July 21, 1852; by reason whereof Beaubien was also interested in the location of the line of excavation.

Col. Graham, who was sent to Chicago in 1854, was instructed to fix the boundaries of the lots granted to Beau-

bien. He encountered difficulties. In the first place he found that in any settlement of the southerly limit of excavation the Illinois Central Railroad Company had rights that must be reckoned with, and in the second place he discovered that on the map accompanying the memorial of January 15, 1852, there appeared two red lines and one blue line, and that while none of the lines were accurate the blue line more nearly approximated the presumptive limits of excavation than either of the red lines. He proceeded accordingly to seek an adjustment among the several parties in interest and after extended negotiations brought about the execution of the above mentioned formal agreement of September 26, 1855, fixing a line of excavation of which in his report to the War Department (p. 33) he speaks as follows:

“This line, which is to give a new shore on the south to a portion of Chicago River, while it will render the turns in the river easy for shipping, preserves a uniform width of not less than 200 feet for the navigable channel, and secures, for the accommodation of general commerce, the whole of River street, which the most southern red line of the memorialists’ map (A) would have almost entirely destroyed. Another advantage to commerce is, that the northern margin of that portion of River street which runs east and west will coincide with the margin of the river, and thus, by precluding the interposition of buildings between the shore and that street, will afford valuable facilities for discharging cargoes from the shipping. The most northern red line of map A would have left a very narrow strip of land between River street and the shore of the river, not wide enough for building lots, but which would have cut off from the shipping the facilities of discharging their cargoes upon the northern margin of this street.”

The agreement itself (Graham report, p. 79) begins with a recital that there is doubt and uncertainty in regard to the extent of the ground which may be excavated under the Act of July 21, 1852, arising from an ambiguity in the map which accompanied the memorial of January 15, 1852, which ambiguity likewise affects the interest of the Illinois Central

Railroad Company under the deed of October 14, 1852, and the interest of Jean Baptiste Beaubien under the Act of August 1, 1854; also that after full consultation with the parties Col. Graham has marked out the following as the line or limit of the excavation to be made by the city authorities and has designated the same by the red line $x A B y$ on the accompanying map, called "Map G No. 17," as follows (describing it):

A blue print purporting to be a copy of Map G 17 has been examined in the office of the United States Engineer at Chicago, showing the signatures of the parties, and a line marked "Ill. Cent. R. R. Co.'s boundary under deed from Secy. of War of Oct. 14, 1852." This line extends from the southeast corner of Lot 5 in Block 5 north across the proposed line of excavation to the old pier, crossing River street without any break 250 feet east of Michigan avenue, where River street appears to terminate. The agreement describes the line of excavation as beginning at point "x" at the interior angle of the south pier, and running thence westerly 270 feet in prolongation of the interior or river face of said south pier to point A, thence westerly 565 feet on another straight line A B "coinciding in direction with the north margin of River street and occupying the said margin of the said street so far as it is laid down on the plat or plan of the City of Chicago east of its junction with Michigan avenue."

After the aforesaid recitals the several parties, "in consideration of the benefits to be derived therefrom by all and singular of the said parties, consent, ratify and confirm *the aforesaid line and limit of excavation* determined as above stated," in fulfillment of the Acts of July 1, 1852, and August 1, 1854, and the deed of October 14, 1852, "as bounding and defining the extent of the rights of all and each of the aforesaid parties in interest under the aforesaid acts of Congress and deed of sale."

It is vigorously contended that this contract of September 26, 1855, is a final determination of the easterly limit of River street at a line 250 feet east of Michigan avenue as represented on the Map G 17; that the agreement confirms the deed to the Illinois Central Railroad Company "as bounding and defining the extent of the rights of each and all of the aforesaid parties in interest under the aforesaid Acts of Congress and deed of sale"; and that by necessary consequence it establishes the terminus of River street at the line drawn across it 250 feet east of Michigan avenue. No such effect can be given to the instrument by way of formal contract. It does not confirm or ratify the *map* as defining the rights of the parties under the deed, but only "the *line and limit of excavation* determined as above stated," that is to say, determined by the description and map. Any other conclusion would require the contract to mean that a line forming the north boundary of the tract was confirmed as fixing the west boundary. The contract as such contemplates no determination of any rights whatsoever of the Illinois Central Railroad Company except the delimitation of the area which the City of Chicago was entitled to excavate off the north side of its property for the purpose of straightening the channel of the river. The line appearing on the Map G 17 as the terminus of River street suggests that the parties did not at that time regard the street as extending farther east, but its legal effect, if any, must rest on some doctrine of recognition, acquiescence or estoppel and not on contract. The elements of estoppel are wanting, and enough has been said under an earlier head of this opinion to justify the view that, in the absence of valuable improvements blocking traffic, the city would not necessarily lose its rights beyond the line 250 feet east of Michigan avenue through mere recognition of that line as the terminus of River street under a mistaken conception of the law.

River street is delineated on various maps as extending along the river to Slip A, immediately east of the old stone freight house, and there turning south, or connecting with a thoroughfare running south, between the old freight house and Slip A, to South Water street. See the Morehouse map, the 1887 map at original page 1204 of the printed record, and the blue print purporting to show present occupancy. A paved roadway now runs in fact from Michigan avenue to the north-west corner of the old stone freight house, where further passage to the east is barred by structures apparently constituting part of the Goodrich Transit Company's docking facilities. At this terminus there is an outlet to South Water street along what appears to be a private roadway paved with granite blocks west of and contiguous to the stone freight house. The west wall of the freight house seems to be here, as at South Water street, about 560 feet east of Michigan avenue. Under what circumstances the Goodrich Transit Company structures were erected, and how long they have stood, are questions upon which no evidence has been submitted. They block access to Slip A, which is represented on certain city atlases as approximately 722 feet east of Michigan avenue.

Independently of other considerations, the existence of a public street extending to the freight house might be shown by actual occupation and public travel for a period of years, under circumstances not inherently improbable, but not established by evidence now available; and such occupation and travel, before the erection of the Goodrich structures, may have extended as far east as Slip A. The effect of those structures upon any public right of travel previously existing would probably depend on their character, their permanence and the circumstances attending their erection.

Thus far the discussion has been confined to particular arguments considered singly, and it appears that, while there are many arguments against the right of the city to extend or

occupy River street beyond the line 250 feet east of Michigan avenue, no one of these arguments taken by itself is unanswerable or necessarily conclusive. Under these circumstances it might be deemed permissible to resolve all doubts in favor of the city. It does not follow, however, because each of several obstacles may be surmounted, that all of them together can be successfully overcome. In passing upon a problem which involves so many doubtful elements of law and fact, due regard must be had to their cumulative effect, and, furthermore, any conclusion must rest finally upon a balance of probabilities. On the whole evidence, considered in the mass, the only opinion I feel justified in expressing with respect to River street is that the city *may* have the right to an extension of the street more than 200 feet east of Michigan avenue, but that there are serious obstacles to the establishment of such a right.

II.

TITLE TO SLIPS.

The five slips with reference to which an opinion is asked are known as Slips A, B, C, D and E, and extend into the yards or between the docks of the Illinois Central Railroad Company east of Michigan avenue and north of Randolph street. Three of these run south from the Chicago River. Slip A, as already indicated, is about 722 feet east of Michigan avenue. Farther east are Slips B and C, the latter immediately west of a pier stated on the Morehouse map to have been built in 1867, the east line of which is the old breakwater constructed by the railroad company. Beyond this breakwater and jutting eastward into the lake are three extensive piers numbered from north to south 1, 2 and 3. According to the Morehouse map Pier 1 was built in 1872 and 1873, Pier 3 in 1880, and Pier 2 in 1881. Slip D is the basin between Piers 1 and 2, and Slip E is the basin between Piers 2 and 3. Each of them opens directly into Lake Michigan.

It is understood that the Illinois Central Railroad Company desires a permit to fill up one or more of these slips, thereby converting them into a part of its yards and docks. Section 1 of Article V of the City and Village Act empowers the city council "to regulate and control the use of public and private landing places, wharves, docks and levees"; also "to control and regulate the anchorage, moorage and landing of all water craft and their cargoes within the jurisdiction of the corporation"; also "to make regulations in regard to use of harbors, towing of vessels, opening and passing of bridges"; and "to appoint harbor masters and define their duties."

Chapter XXXVI of the Chicago Code of 1911 relates to "harbor, harbor master, bridges, wharves and vessels." Section 1097 provides that the harbor shall include the Chicago River and its branches, all slips adjacent to and connecting with the Chicago River, all piers and basins and the waters of Lake Michigan, including all breakwaters, piers and permanent structures therein for a distance of three miles from the shore between the north and south lines of the city extended; and that said harbor shall be subject to the control of the harbor master under the supervision and according to the directions of the commissioner of public works, and the use thereof shall be governed by the ordinances of the city. The amendment of October 28, 1912, to Section 1097 (Council Proceedings, page 2141), does not change the above-recited provisions thereof. Section 1098 provides for the appointment of a harbor master. In and following Section 1125 it is provided that every owner, lessee or person in possession of premises abutting on the harbor shall keep the wharves and docks in good repair, and the harbor master is directed to require all persons engaged in repairing, renewing, altering or constructing any dock to produce a permit from the Department of Public Works specifying the character and location of the work to be done, in default whereof it is the harbor master's duty to stop the work and arrest the per-

sons unlawfully engaged therein, and the offenders are also required to undo the work thus unlawfully prosecuted. No person shall drive or place any pile or piles, stone, timber, earth or other obstruction in the harbor of the city, or build, construct or repair any dock therein without written permit from the commissioner of public works. All encroachments upon the harbor lines are to be reported by the harbor master to the city engineer, and such action shall be taken as may be necessary to cause the removal of such obstruction or encroachment.

The ordinances of November 20, 1911 (Council Proceedings, pages 1787 and 1788) establishing Harbor Districts Nos. 1 and 2, do not confine the Chicago harbor within the limits of the districts thereby created, nor derogate from the authority of the city over the harbor as already existing.

The slips east of Michigan avenue and north of Randolph street are part of Chicago harbor. Harbor District No. 1, as defined by the ordinance, includes among other things the Chicago River and all the waters, submerged lands and made lands within the river. Harbor District No. 2 is bounded on the west by a line running along the lake shore between the south line of Randolph street extended and the Chicago River. Each of the ordinances was accompanied by a plat which was made a part thereof. These plats are on file in the office of the city clerk. Certain parts of them are colored red, evidently for the purpose of defining the harbor district. Upon the plat of Harbor District No. 1 the Chicago River is colored red, together with the slips opening from the river. The plat of Harbor District No. 2 shows a red line running from the extension of Randolph street north to the Chicago River along the front of the Illinois Central Company's piers, but the slips between these piers are not colored red. It has been argued that the plat of Harbor District No. 2 shows that Slips D and E are excluded therefrom. Whether such be the case or not is

immaterial. The harbor districts do not define the limits of Chicago harbor.

It thus appears that these slips are under the jurisdiction of the harbor master, and that a city permit is required by the police regulations before any slips can be filled up. Such permit could not lawfully be withheld if the company had a clear right to fill up the slips, and on one occasion the Illinois Central Railroad Company contended that the foregoing provisions of the city ordinances were void under the Constitution of the United States as an impairment of the rights and privileges conferred upon it by its charter. The Supreme Court of the United States ruled that if the charter were in fact to be construed as giving the company, as claimed, a right to fill in the bed of the lake for purposes of building engine houses and other works, the city ordinances might be condemned as an unlawful invasion of that right and as violative of the Federal Constitution. But the court went further and held that the company's charter, the provisions of which are elsewhere herein set forth, gave the company no such right as it asserted and hence that the harbor ordinances are a valid and legitimate exercise of the police power.

Illinois Central Railroad Company v. Chicago, 176 U. S., 646.

In the following argument some of the facts already stated are repeated for the sake of clearness.

The Illinois Central Railroad Company was incorporated by act of the General Assembly of the State of Illinois, approved February 10, 1851. (Private Laws, 1851, page 61.) Section 3 provided that the corporation might appropriate to its sole use and control, for the purposes contemplated in the act, a right of way 200 feet wide, and might enter upon, take possession of and use any lands, streams and materials for the location of depots, construction of bridges, station grounds, engine houses, shops and other buildings "necessary for the

construction, completing, altering, maintaining, preserving and complete operation of said road," and that "all such lands, waters, materials and privileges belonging to the state are hereby granted to said corporation for said purposes." Section 8 makes the proviso that "nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of the common council of said city."

Such consent was given by the city council in and by the ordinance of June 14, 1852. (Special ordinances, 1915 ed., page 861.) Permission was granted to the company to construct within the city and along the margin of the lake a railroad northerly to such grounds as the company might acquire north of Randolph street in Fort Dearborn Addition, upon which grounds it was ordained that there should be located the depot and such other buildings, slips or apparatus as might be necessary and convenient for the business of the company. Section 3 authorized the company to extend its works and fill out into the lake as far as a line parallel with Michigan avenue running from a point in the southern pier 400 feet from the east end thereof to the north line of Randolph street extended. The breakwater was built along that line and the intervening space filled up.

The bed of the lake belonged to the State of Illinois and not to the City of Chicago, and the ordinance of June 14, 1852, could not therefore operate as a grant of title to the submerged land, but merely gave permission, so far as the city was concerned, for the extension of the works of the railroad company, pursuant to the powers conferred by its charter, over an additional area in the City of Chicago.

The so-called Lake Front Act of April 16, 1869 (special ordinances 1915, page 866) was entitled "An Act in relation to a portion of the submerged lands and lake park grounds lying on and adjacent to the shore of Lake Michigan, on the

eastern frontage of the City of Chicago.” Section 3 contains the following provisions:

“The right of the Illinois Central Railroad Company under the grant from the state in its charter * * * and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control, in and to the lands submerged or otherwise lying east of said line running parallel with and 400 feet east of the west line of Michigan avenue, in fractional sections 10 and 15, township and range as aforesaid, is hereby confirmed, and all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile, and between the south line of the south pier extended eastwardly, and a line extended eastward from the south line of lot 21 * * * are hereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns.” Provided, “that nothing herein contained shall authorize obstructions to the Chicago harbor or impair the public right of navigation.”

Fractional section 10 above referred to includes the territory east of Michigan avenue between Randolph street extended and the river, upon which Fort Dearborn Addition is located.

This act was passed over the Governor's veto, and the General Assembly in 1873 passed another act purporting to repeal it *in toto*. The company disputed the validity of this repeal, and prepared extensive plans for the development of Chicago harbor for general purposes of navigation, having little if any relation to the functions and powers of a railroad company conferred by its charter. In regard to these plans it became involved in a controversy with the public authorities, and in 1883 the Attorney General of the State of Illinois filed an information to determine the rights of the company. To this litigation the Illinois Central Railroad Company, the State of Illinois and the City of Chicago were all parties. The original decree of the Circuit Court of the United States for

the Northern District of Illinois, entered September 24, 1888, finds the title to certain public grounds and other lands to be in the City of Chicago and proceeds as follows:

“That the Illinois Central Railroad Company is the owner in fee of all the wharves, piers and other structures erected by it in the city of Chicago, east of Michigan avenue, south of Chicago River, and north of the north line of Randolph street, extended eastwardly as shown upon said Morehouse map, including the station grounds lying west of the slip C, the pier marked C lying east of slip C, and represented upon the Morehouse map to have been built in 1867, and piers 1, 2 and 3, lying east of pier C last mentioned, and represented upon said map to have been built as follows: pier 1 in 1872 and 1873, pier 2 in 1881, and pier 3 in 1880; and is also entitled to the use, for purposes of its business, of the slips marked on said Morehouse map.”

The slips last mentioned are those now under consideration. That the “other structures” found to be *owned* by the company do not include the slips is obvious from the fact that the company is found to be “also” entitled to the *use* of the slips.

After certain other findings with reference to parts of the shore not now in question, and after the finding herein above quoted respecting the effect and operation of the Lake Front Act of April 16, 1869, the decree concludes as follows:

“It is further ordered, adjudged and decreed that the defendant, the Illinois Central Railroad Company, be and it is hereby perpetually enjoined and restrained from erecting structures or in filling with earth or other materials any portion of the bed of Lake Michigan as it now exists and as shown on said Morehouse map east or in front of said fractional sections ten and fifteen—that is, east or in front of the grounds now occupied and used by it between Chicago River and the north line of Randolph street extended eastwardly, or east or in front of the grounds now occupied and used by it between the north line of Randolph and the center line of Sixteenth street, each extended eastwardly, except that said company may complete the slip or basin already commenced

immediately north of Sixteenth street extended, with a wharf on each side of it not exceeding one hundred feet in width each, where vessels coming into such slip or basin may load and unload and upon which tracks of the company may be laid.”

The case was appealed to the Supreme Court of the United States, which handed down its decree and mandate April 10, 1893. This mandate, after reciting in full the decree of the lower court, proceeds as follows:

“On consideration whereof, it is now here ordered, adjudged and decreed by this court that the State of Illinois is the owner in fee of the submerged lands constituting the bed of Lake Michigan which the third section of the act of April 16, 1869, purported to grant to the Illinois Central Railroad Company, and that the act of April 15, 1873, repealing the same is valid and effective for the purpose of restoring to the state the same control, dominion and ownership of said lands that it had prior to the passage of the act of April 16, 1869.

But the decree below, as it respects the pier commenced in 1872 and the piers completed in 1880 and 1881, marked 1, 2 and 3, near Chicago River, and the pier and docks between and in front of Twelfth and Sixteenth streets, is modified so as to direct the court below to order such investigation to be made as may enable it to determine whether those piers erected by the company by virtue of its riparian proprietorship of lots formerly constituting part of section ten extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake; and if it be determined upon such investigation that said piers or any of them do not extend beyond such point, then that the title and possession of the railroad company to such piers shall be affirmed by the court; but if it be ascertained and determined that such piers or any of them do extend beyond such navigable point, then the said court shall direct the said pier or piers to the excess ascertained to be abated and removed, or that other proceedings relating thereto to be taken on the application of the state as may be authorized by law; and also to order that similar proceedings be taken to ascertain and determine whether or not the pier and dock constructed by the railroad company in front of the shore between

Twelfth and Sixteenth streets extend beyond the point of navigability and to affirm the title and possession of the company if they do not extend beyond such point, and if they do extend beyond such point to order the abatement and removal of the excess, or that other proceedings relating thereto be taken on application of the state as may be authorized by law. Except as modified in the particulars mentioned, the decree in each of the three cases on appeal must be affirmed with costs against the railroad company."

The subsequent inquiry about encroachments beyond the line of practical navigation was determined in favor of the company, and a supplemental decree was accordingly entered by the Circuit Court May 26, 1896, which, after reciting the evidence introduced with respect to the line of navigation, concludes as follows:

"It is found and adjudged by the court that the said piers and docks referred to in the aforesaid judgment and mandate of the Supreme Court and there described as piers marked 1, 2 and 3, near Chicago River, and the piers and docks constructed by the said railroad company in front of the shore between Twelfth and Sixteenth streets, all in the city of Chicago in the State of Illinois, do not extend nor does either of them extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake.

"It is therefore ordered, adjudged and decreed that the title and possession of the said Illinois Central Railroad Company to the said piers and docks, and each of them and every part thereof, be and the same is hereby affirmed."

This supplemental decree was affirmed by the Circuit Court of Appeals in an opinion reported in 91 Fed. Rep., 955, and by the Supreme Court of the United States, 184 U. S., 77; the result being that, except as expressly modified by the mandate of the Supreme Court above quoted, the original decree of September 24, 1888, stands in full force and effect.

Title to the bed of Lake Michigan is vested in the State of Illinois, and mere ownership of the shore gives the pro-

prietor no right to reclaim land from the shallow waters of the lake nor to erect any structures whatever upon the submerged land.

Revell v. People, 177 Ill., 468.

Cobb v. Lincoln Park Commissioners, 202 Ill., 427.

Shively v. Bowlby, 152 U. S., 1.

While title to the bed of the lake is held by the state in trust for the people for purposes of navigation, the right of the state to prevent encroachment does not depend at all upon such encroachments being obstructions to navigation.

Revell v. People, 177 Ill., 468.

Unless the title to the submerged land in these slips is vested in the company, it remains in the State of Illinois, and nobody can build upon it without the state's consent. The Illinois Central Railroad Company, therefore, in asserting a right to fill up the slips assumes the burden of showing either title in itself or a license from the State of Illinois.

The charter of the Illinois Central Railroad Company did not operate as a grant to the company of any lands submerged beneath the waters of Lake Michigan, nor did it give the company any right to reclaim such submerged lands.

Illinois Central R. R. Co. v. Chicago, 173 Ill., 471.

Illinois Central R. R. Co. v. Chicago, 176 U. S., 646.

In the case last cited the United States Supreme Court decided, first, that the bed of the lake was not granted to the company or devoted to its use by the description of "lands" or of "streams" or of "waters," as those terms are used in its charter; and secondly, that even if the charter were susceptible of the construction contended for by the company no extension of its grounds for tracks, engine houses, depots and shops could be made within the city limits until the consent of the city council had been secured.

The Lake Front Act of 1869 was adjudged by the decree in

the Lake Front case to be valid in so far as it purported to confirm any grant made to the company under its charter, and said act, while in force, operated as a license legalizing certain works undertaken by the company, but after its repeal in 1873 it gave the company no authority to encroach further upon the waters of Lake Michigan. The act, in confirming any grant made by the charter, obviously could not confirm any asserted rights which, by the decision of the court in the case between the same parties last commented upon, were found not to be granted by the charter at all.

The decree in the Lake Front case confirmed in the company the title to the piers and to "the use for the purposes of its business" of the intervening slips. The right to use the slips does not, as the company seems to contend, import a right to destroy them by converting them into dry land and using that as a part of the railroad yards and docks. Even if the right confirmed by the decree to the use of the slips could be construed as meaning an exclusive right, the conclusion would not follow that the company could destroy the slips and cast the burden of its shipping into the open water beyond.

The fact that the decree quieted title to the piers does not tend to prove that the company owned the intervening slips. Such a claim was made and denied in a proceeding in New York to acquire land for construction of the municipal subway system. A dock company claimed compensation for certain submerged lands lying between two piers, both of which it owned in fee, but the court in rejecting the claim said:

"Whatever rights the dock company had in these lands were such as under common-law principles were incident and appurtenant to the ownership of the piers above described. Under these principles the owner of the piers had a right of reasonable access over the waters covering the surrounding lands, though title to such lands was in the state. * * * The possession and enjoyment of these rights did not create necessarily any title in fee in the lands alongside or between the piers. Title in fee to such

lands could be acquired only by grant and not as a mere incident or appurtenance to the ownership of the piers."

In re McClellan, 146 App. Div., 594; 131 N. Y. Supp., 633; 204 N. Y., 677; 98 N. E., 1107.

The decrees in the Lake Front case enjoin the Illinois Central Railroad Company from filling any part of the lake "east or in front of the grounds now occupied or used by it," between the Chicago River and the projection of Randolph street. Whether the slips fall within the letter of this prohibition may be a debatable question, but even if they do not the injunction against filling beyond a certain line could hardly be tortured into an affirmative license to do something else which the court may have supposed to be lawful but which was in fact unlawful. It must be borne in mind that the Lake Front decision, as was afterwards conceded, rests in part on a mistaken view of the rights of riparian owners in Illinois to reclaim the submerged shallows. The Supreme Court of the United States erroneously assumed that by the law of Illinois an owner of the shore had the right to build wharves and piers into the lake until they reached water of navigable depth. The decision, though legally wrong in so far as it is based on that assumption, no doubt estops the parties with respect to rights actually adjudicated, but obviously it should not be extended by implication or by broad principles of interpretation so as to enlarge the scope of the estoppel. While the legal operation of this injunctive order is not free from doubt, the evident purpose of the decree was, while leaving the company with what it had already acquired, to forbid further encroachments, and it should be limited to that effect.

In the supplemental decree of May 26, 1896, there is a reference to "docks" as well as "piers." A careful reading of the text of the decree hereinabove quoted will serve to make it clear that wherever docks are mentioned the reference is to certain wharves or structures between Twelfth and Sixteenth

streets, and that the term does not, as has been argued by counsel for the railroad company, have any application to slips, whether north of Randolph street or elsewhere. Indeed, the engineer of the Illinois Central Railroad Company, in a communication dated May 5, 1919, transmitting to the company's counsel the documents relating to Slip B about to be mentioned, speaks of the "docks immediately on the sides of the slips," refers to the fact that the company "built the docks along the east and west side of Slip B," and in other passages makes use of the word "docks" as contradistinguished from slips and basins.

A further specific claim of title to Slips A and B is made on behalf of the Illinois Central Railroad Company by reason of evidence contained in two contracts which it entered into with the United States, one dated April 20, 1855 (Graham Report, p. 59), and the other dated May 21, 1859. According to a map furnished by the railroad company with a copy of the latter contract, Slip A, originally wider than now, was begun in 1854 and completed in 1855, and Slip B was begun in 1856 and completed in 1858. The old south pier, constructed by the Government many years before the Illinois Central Railroad Company came into being, barred access from these slips to the lake, and the argument is that Slips A and B were mere basins created by the railroad company for its own convenience on its own private property. The records do not warrant that conclusion.

By the two contracts above referred to permission was granted to the company to cut openings through the south pier so as to connect Slips A and B, respectively, with the channel of the river. In consideration of a Government permit, the Illinois Central Railroad Company by each contract agreed that before making any breach in the pier it would render the walls of its ship basin water-tight on all sides; that a drawbridge with substantial abutments should be constructed

across the opening; that all expense of construction, repair and maintenance should be borne by the company; and that in case of revocation of the permit the company should close the opening and restore the pier to its former condition.

Neither the State of Illinois nor the City of Chicago was a party to these contracts. So far as the evidence now available discloses, the so-called "basins" were not excavations made or to be made in lands to which the Illinois Central Railroad Company had acquired title, but are portions of the bed and waters of the lake or river which were left unfilled, and the openings in the pier were permitted in order to prevent the pier from shutting off traffic between the basins and the exterior waters. Any title claimed by the company to its made lands rests on the terms of the decree in the Lake Front case. Long before the Lake Front litigation began Slips A and B, exactly like the other slips, opened directly into the public waters, and the decree in no way differentiated between them. It has already been noted that the railroad company claimed the right to engage in extensive projects for harbor development, which right was subsequently denied by the courts. Under these circumstances there is at least substantial doubt as to the right of the company to fill and use the slips to which the openings in the pier constitute the entrances.

In my opinion the jurisdiction of the harbor master extends over the five slips lying between the piers or penetrating the grounds of the Illinois Central Railroad Company, and the right of the company to fill the slips is at least so questionable as to justify the city authorities in refusing a permit for such operations, subject to such action as the city council may authorize with respect thereto.

Yours respectfully,

WALTER L. FISHER.

